(1) Supreme Court, U.S.
FILED

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No. Or...

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS A. BEASLEY--- PETITIONER

vs.

SODEXHO USA, INC., et al --- RESPONDENT(S)

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

MARCUS A. BEASLEY
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QUESTION(S) PRESENTED

1. **Why is the 4th Circuit's opinion different than the Fifth Circuit and the Supreme Court with regard to Discharge for Same Misconduct or Crime in which a minority and non-minority both participated?**

2. **Why did the 4th Circuit not apply the law 7.5(A) (LAW GOVERNING MARYLAND EMPLOYERS) when the Plaintiff admits that he had performance problems or that he was engaged in Misconduct , the nature of his Prima Facie case changes." Why was this section of the law not applied in this case?**

3. **Would major inconsistencies as to basic facts between the Defendant's deposition and the deposition of Plaintiff's immediate supervisor constitute fair doubt in the minds of a reasonable jury?**

4. **Why did the 4th Circuit not allow an amendment of retaliation to be added by the plaintiff during his deposition?**

5. **Why would the Fourth Circuit disallow a retaliation claim during discovery and post employment when critical evidence supporting retaliation was revealed during this process?**

6. **How could the 4th Circuit clearly indicate that Plaintiffs job performance was satisfactory in March, 1997, but disregard a written warning given by the Defendant one month prior stating the contrary?**

7. **Why did the Fourth Circuit in it's operative facts conclude that the defendant and John Horton (Plaintiff's immediate supervisor) were of equal rank?**

8. **What would the High Court consider a hostile discriminatory work environment with regard to the number of discrimination complaints?**

LIST OF PARTIES

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject this petition is as follows:

David Healey Regional Operations Manager

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	iii
CONSTITUTIONAL PROVISIONS AND STATUTES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	20
CONCLUSION	22

SUMMARY JUDGMENT FOR DEFENDANT WITH REGARD TO DISCRIMINATION AND RETALIATION CONSTITUTE PLAIN ERROR IN LIGHT OF MCDONALD V. SANTA FE TRAIL TRANSP. CO., 427 U.S. 273, 283 (1976), POLANCO V. CITY OF AUSTIN (5th Cir. 1996) 70 FEP 653 AND ROBINSON V. SHELL OIL CO., 519 U.S. 337 (1997).

TABLE OF AUTHORITIES

Cases

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283	5
Polanco v. City of Austin (5th Cir. 1996) 70 FEP 653	6
Ross v. Communications Satellite Corp 759 F2d 355 (1985)	8

Munday v. Waste Management 4th Cir No. 94-2192 13

Robinson v. Shell Oil., 519 U.S. 337 (1997) 14

Payne v. Norwest Corp. (9th Cir. 1997) 113 F. 3d 1079 14

Constitutional Provisions and Statutes

U.S. Consti., Title VII of the Civil Rights Act of 1964 2000e 3

U.S. Consti., Title VII Section 704(a) 3

TABLE OF CONTENTS OF APPENDIX

Opinion of the United States Court of Appeals for the Fourth Circuit in Marcus A. Beasley v. Sodexho USA, Inc; David Healey, No. 00-2070 1

U.S. Consti., Title VII of the Civil Rights Act of 1964 3

U.S. Consti., Title VII Section 704(a) 3

LAW GOVERNING MARYLAND EMPLOYERS 7.5 (A) DISCHARGE CASES 3

LAW GOVERNING MARYLAND EMPLOYERS 7.5(C) DISCHARGES IN RETALIATION FOR FILING COMPLAINTS OF DISCRIMINATION 5

AFFIDAVIT OF CHRISTELL ROSS 6

AFFIDAVIT OF JOHN HORTON 8

AFFIDAVIT OF JOANN MERRITT 11

DEPOSITION EXCERPTS OF DEFENDANT HEALEY 13

JUDGMENT ORDER 18

OPINIONS AND ORDERS BELOW

The per curiam opinion of the United States Court of Appeals For the Fourth Circuit is unpublished. It is copied in the Appendix hereto. (App. At 1)

Petitioner is not aware of any reported opinions or orders of the trial Court, the United States District Court for the District of Maryland, Bearing upon the questions presented by this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 06, 2000. The jurisdiction of this court to review that judgment is invoked under 28 U.S.C., sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner submits that the following constitutional provisions and Statutes are involved:

U.S. Consti., - Title VII of the Civil Rights Act of 1964 2000e
U.S. Consti., Title VII Section 704(a)

Their pertinent text is set out in the Appendix hereto. (App. 2)

STATEMENT OF THE CASE

The main issues at hand involved in this case are as follows:

1. A minority and non-minority were in the same position, experienced the same performance issues, had the same managers and employees, yet the non-minority employee was never given a written warning and was transferred or re-assigned; while the minority employee was written up twice and terminated.
2. During employment, the Defendant admits to keeping computer notes specifically on plaintiff. However, the plaintiff did not find out about this until post employment during discovery and the Defendants deposition in which the administration period had passed. Therefore, based on logic, it is clearly evident that an adverse condition of employment had taken place and retaliation should be allowed to proceed in this case
3. Plaintiff reported to Defendant about non-minority's racial epitaphs in workplace on two occasions; Defendant labels Plaintiff as an instigator, issues Plaintiff a written warning and terminates Plaintiff 1 month later.
4. The testimonies of Defendant and John Horton are the exact opposite which leads to a genuine issue for trial.
5. Plaintiff receives a satisfactory performance review in March by his immediate supervisor. 1 month prior, the Defendant gives the Plaintiff a written warning about performance issues and does not consult with his subordinate (Horton) about Horton's evaluation of the Plaintiff.
6. In it's operative facts, the 4th Circuit clearly makes a crucial error when it states,"' It appears that Horton and Healey are equal in rank".
7. Disrict Court states, " Cook v. CSX Transp. Corp., 988 F. 2d 507, 511 (4th

Cir. 1993) that Plaintiff has not produced evidence sufficient to create a dispute of fact with respect to element (2) and (3). The record indicates that seven months prior to the May 5, 1997 written warning, Sodexho twice disciplined and then terminated John Ruyak, a white cafeteria manager for poor performance."

Although, the 4th Circuit's Judgment Order indicates Sodexho twice disciplined and terminated John Ruyak ; the fact is, the disciplinary action and ultimate termination was executed by Alicia Dixon Sledge (African American manager) who was subsequently terminated 1 month after she initiated these actions. It should be noted that Defendant David Healey was not assigned to this account during the Ruyak/Sledge incident.

The Defendant started approximately 5 weeks later.

Plaintiff's discrimination case is centered around David Healey's actions with comparison to Karl Gartman and Marcie Blatt. Plaintiff only worked with John Ruyak for 1 month and Defendant was not yet assigned.

District Court seems to take as fact the Defendants evidence without weighing the inconsistencies and the disputed evidence submitted by the Plaintiff.

1. Question 1:
In Defendant's letter dated Nov. 22, 1997 Mr. Healey writes: "The cafeteria feeding area was only producing average sales of $3,800 per day on a budget of $4,400 AND WAS IN NEED OF MORE FOCUSED ATTENTION. AT THAT TIME KARL GARTMAN (WHITE) WAS MANAGING the cafeteria under Mr. Beasley' s direction. Due to the CONTINUED POOR FINANCIAL PERFORMANCE, I RESTRUCTURED THE RETAIL MANAGEMENT FOR THE DEPARTMENT AND REMOVED MR. GARTMAN FROM THE OPERATION, JANUARY 1997. AFTER MR. GARTMAN WAS RE-ASSIGNED, I MADE THE DECISION TO REALIGN MR BEASLEY'S MANAGEMENT PRIORITIES".
Mr. Healey later also writes," In addition to not meeting sales targets the cafeteria operation was not MEETING CUSTOMER EXPECTATIONS. THE OPERATION WAS NOT OPEN FOR BUSINESS ON TIME, ITEMS PUBLISHED ON THE MENU WERE INCONSISTENTLY PROVIDED, AND THE ATTITUDES OF THE STAFF DID NOT MEET SERVICE ATTITUDE EXPECTATIONS, IMPLEMENT SYSTEMS TO MAINTAIN THE EXPECTATION. MR BEASLEY'S CHARGE WAS TO CORRECT THOSE DEFIENCIES".
It is clear that there was serious substandard performance in the cafeteria in which a non-minority was directly responsible. However, **the non-minority was never written up but rather transferred to another Sodexho account**.

Mr. Healey writes at the end of his letter," **MR BEASLEY WAS ASKED TO RESIGN HIS POSITION** IN THE CAFETERIA DUE TO INCONSISTENCIES IN THE CAFETERIA OPERATION, NOT COMPLYING WITH STANDARDS SET FORTH AND COMMUNICATED, INABILITY TO DEMONSTRATE SUSTAINED PROGRESS ON THOSE PREVIOUSLY STATED EXPECTATIONS."

THIS CLEARLY IS A VIOLATION OF TITLE VII. In the leading case of McDonald v. SantaFe Trail Transp. Co.,[242] the plaintiff alleged that he was discharged for alleged misappropriation of cargo, but a fellow employee of a different race was similarly implicated in the misappropriation was not discharged. The employer argued that the complaint of discrimination should be dismissed solely because the plaintiff was involved in serious misconduct for crime. The Supreme Court disagreed. They stated," that while the employer may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be applied alike to members of all races, and Title VII is violated if, as petitioner's alleged, it was not."[243] The Supreme Court noted that in order to establish a prima facie case, **the plaintiff need not establish a precise equivalence in culpability between himself and the employee retained: rather he need only establish that employees involved in acts against the employer of "comparable seriousness" were nevertheless retained** [244]

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[242] 427 U.S. 273 (1976).
[243] Id. At 283.
[244] Id. At 283 n. 11.

In Polanco v. City of Austin, a Hispanic police officer had been discharged for testifying inaccurately regarding a false confession while a white officer guilty of virtually the same misconduct had merely been given a written reprimand, the Fifth Circuit concluded that evidence of discriminatory atmosphere and a biased investigation, had SUPPORTED A FINDING OF DISCRIMINATION.
Mr Healey admitted that a report written by Steve Brush reflected negatively on Marcie Blatt (white) during the time Plaintiff was employed, yet Blatt was not disciplined. Healey Tr. at 179-181.
In conclusion, Karl Gartman, who is white, was responsible for managing the Sodexho cafeteria between October and February 1997, a time during which cafeteria operations were substandard, Gartman was never disciplined for his lack of performance. The reason Defendant Healey gives for not having disciplined Karl Gartman, who is white and has never complained about discrimination, is that Gartman did not report directly to him. Healey Tr. at 192. However, when Healey was disciplining Plaintiff Beasley for inconsistencies, Plaintiff did not report to him either.

QUESTION 2

The Fourth Circuit in it's summary judgment indicates that,"Plaintiff admits that he had performance shortcomings related to his management of the areas for which he was responsible. These included problems related to customer service, consistency of business hours, product quality, availability and employee attitudes." (exact same issues as Gartman) Defs' Ex. 1 at 236-37, 240-41, 250,274-77; Ex 11. According to Maryland Employment Law, when the discharged Plaintiff admits that he was not performing his job in a satisfactory manner or that he was engaged in misconduct, the nature of his prima facie case changes.

In this situation, the Plaintiff must prove that similarly situated employees of a different race or sex were performing in a comparable manner or engaged in comparable misconduct but were not severely disciplined. In such cases, their prima facie case has been reformulated as follows:

1. He is a member of a protected group;
2. A company policy or practice existed concerning the activity for which he was discharged;
3. Non-minority employees either were given the benefit of lenient company practice or not held to compliance with a strict company policy;
4. The minority plaintiff was treated differently in that he was not given the benefit of a lenient policy, and was held to compliance with a strict policy.

It is obvious that Marcie Blatt and Karl Gartman had recognized performance problems in the same position that the Defendant was aware of yet he failed to discipline them.

Defendant testified that Blatt was disciplined and that the discipline should be found in her personnel file. There was no such discipline. Horton Tr. at 38; Healey Tr. at 156-157.

Question 3

The Fourth Circuit states in Ross v. Communications Satellite Corporation 759 F2d 355 (1985)," the nonmoving party must produce specific facts showing a genuine issue for trial, the Court defined genuineness as evidence creating fair doubt." These contradictions in the Defendant's own testimony along with the contradictory testimony of Plaintiff's immediate supervisor will no doubt create fair doubt in the minds of a reasonable jury.

1. Defendant Healey admitted during his deposition that Sodexho's Managers Guide and Employment Handbook prohibited retaliating against employees who raise issues of race discrimination and such retaliation included treating them differently, yet he treated Plaintiff differently by keeping notes on him because he filed an EEOC complaint. Healey Tr. at 8-9 , 46.
2. Defendant Healey states on one hand that Marcie Blatt had no input in discipline or terminations. Healey Tr. at 52. Yet he contradicted that testimony by admitting that he considered Blatt's input when he disciplined Plaintiff. Healey Tr. at 56, 76.
3. Healey testified that he followed the procedures in the Sodexho Managers Guide and Employee Handbook when he disciplined Plaintiff. Healey Tr. at 81. He again contradicted his own testimony when he admitted that he violated Sodexho policy by not notifying human resources about Plaintiff's race discrimination complaint. Healey Tr. at 141. A similar contradiction was evident when Healey said that he counseled with Sodexho human resources each time he disciplined Plaintiff. Healey Tr. at 82
4. Healey testified that he had to approve all evaluations, yet in later testimony he claims that he

did not know how John Horton had evaluated Plaintiff. Healey Tr. at 82.

5. Healey testified on one hand that he did not discipline employees who did not report directly to him, that it was their manager's responsibility to evaluate their employees, yet he personally disciplined Plaintiff who did not directly report to him but reported to John Horton. Horton Tr. at 17, Healey Tr. at 89-90.

6. Healey admitted, on one hand, that non-discrimination was insured by Consultations with human resources, but also admitted that he never told HR about Plaintiff's complaints of racial discrimination. Healey Tr. at 125, 141.

7. Healey testified that he did not give written discipline to anyone other than Plaintiff . Healey Tr. at 128. Later in his deposition he claimed that he did, in fact, discipline Marcie Blatt who is white and that the discipline should be found in her personnel file. Healey Tr. at 156-157 230. It was not. Horton Tr. at 38.

8. Although Defendant Healey testified during his deposition that Beasley co-employee, Barbara Hicks, did not confirm Plaintiff's allegation of race discrimination at Sodexho, Healey Tr. at 133, Healey's computer notes clearly state that Ms. Hicks did in fact, confirm Plaintiff's allegation relating to derogatory racial remarks being made by Marcie Blatt. Healey Depo. Exh. 3 page 6.

9. While Defendant Healey contends that Plaintiff's performance was consistently below standard, Healey Tr. at 188, John Horton, who was responsible for evaluating Plaintiff, contradicts this view as does Plaintiff's written performance evaluation. Horton Tr. at 19, Horton Depo. Exh. 1.

10.Healey admits that he failed to follow Sodexho policy, disciplined Plaintiff after Plaintiff complained about race discrimination and referred to Plaintiff as an "instigator." Healey Tr. at 142-143.

11. In Healey's letter to Neile Grady Martin Nov. 22, 1997 Healey states," The Cafeteria Operation under Plaintiff was not meeting customer service expectation." Exhibit C. Yet, when Defendant Healey met with the cafeteria workers on April 25, 1997, shortly before Plaintiff's termination, he congratulated them because the customer survey had increased to 88%. Healey Depo. Exhibit 3 page 3. His note dated April 25, 1997, states: I reviewed with the staff that the customer satisfaction surveys had increased to 88% and that they needed to be congratulated and feel proud of their accomplishments." Defendant Healey made no such comments to Plaintiff Beasley although he managed cafeteria operations.

12. Healey claims during his deposition that he himself trained his managers informally on a "daily" basis and if Plaintiff was available he too received this training. John Horton contradicted this testimony by saying that Defendant Healey spent little time on site at the UM account. Someone's testimony is incredible and its up to a jury to determine which. This evidence as applied to the de minimus burden required of Plaintiff To establish a prima facie case is sufficient to allow Plaintiff's race Discrimination and retaliation claims to proceed to trial. Bowman v. United States Environmental Protection Agency, 712 F. Supp. 375, 381-82 (S.D.N.Y. 1989). Also June 12, 2000 see Reeves v. Sanderson Plumbing Products, Inc., Sup. Ct. No. 99-536, Decided.

QUESTION 4&5

The Fourth Circuit indicates in summary judgment that," Plaintiff is barred from raising the retaliation claim because it was not a part of the charge of discrimination filed with EEOC." Then the Fourth Circuit list all of the cases within it's jurisdiction without referencing a higher court and/or another Circuit's ruling.

According to Maryland Law 7.5(C) the strong prohibition against retaliation is not conditioned upon the merit of the claim of discrimination. Similar protections against retaliation are set forth in Age Discrimination in Employment Act and article 49B of the Maryland Code. Even if the claim is meritless, the employee cannot be retaliated against for making the claim. Complainants also are protected against retaliation even if their protest does not rise to the level of a formal charge of discrimination. Informal protest of discrimination , such as **voicing a complaint to a supervisor or using an employer's grievance procedure, are protected activities, and employers cannot take any adverse action against an employee who complains about what he perceives to be discrimination.** In cases where a Plaintiff claims he was unlawfully discharged in retaliation for filing a discrimination charge or for otherwise protesting against discrimination, the plaintiff must establish the following elements of a prima facie case:

1. That he engaged in protected activity;
2. That the employer took adverse employment action against him;
3. That the employer was aware of the protected activity, and
4. That a causal connection existed between the protected activity and the adverse action.

PLAINTIFF'S PROOF OF RETALIATION

1. Filed EEOC charge against former employer. Also complained to Defendant about discrimination in the cafeteria.
   Defendant Healey began keeping notes on Plaintiff in January of 1997, when a co-employee told him that Plaintiff had filed an EEOC charge against another food service company, Aramark. Healey Tr. 8-17
   Plaintiff Beasley complained to Defendant on two occasions regarding Discrimination in caferteria. Healey Tr. at pg. 132, 4-14
2. Defendant started to keep computer notes on Plaintiff specifically. Healey Tr. 8-17.
   When Plaintiff complained about discrimination in cafeteria, Defendant had several employees to keep Plaintiff under surveillance. (document enclosed in file). Documenting Plaintiff from April 3-7. Also Plaintiff received a 2nd written warning on May 5th, 1997. Healey Tr. at 192 17-21
3. Defendant found out about protected activity from Michael Bowman co-worker in the account. Healey states," when I created these computer notes specifically on Mr. Beasley, it had come to my attention through second, third party that Mr Beasley was talking in the cafeteria about how he was filing an EEOC complaint against Aramark. The person I was working with heard that comment, relayed that comment to me and said, "David if you are counseling Mr. Beasley you had better keep documentation. That's when I started."
   Defendant knew about discrimination complaint in cafeteria because Plaintiff went directly to him.
4. The causal connection is Defendant labels Plaintiff as an instigator in his Computer notes. He started documenting Plaintiff because of his protected activity against Aramark and he admits it.

Also he gives Plaintiff a written warning on may 5th , 1997 3 weeks after the complaint of discrimination in the cafeteria. A complaint substantiated by Barbara Hicks and Joanne Merritt. Merritt Depo. #8. Healey Depo. Exh. 3 page 3.

In Munday v. Waste Management EEOC clearly states," the surveillance constitutes an "adverse action" that is likely to deter protected activity, and is unlawful if it was conducted because of Plaintiff's protected activity.

The Eighth Circuit has found,' the court wrote, " that periods of time between Statutorily protected activity and adverse employment actions longer than the three-month period in the instant case were sufficient to create an inference of the requisite causal connection." Additional circumstantial evidence of causation included evidence that management knew about protected activity, and that the employee had thereafter been investigated more closely and punished more severely than others for a certain violation of company rules and Performance standards. That same evidence of unequal treatment provided adequate evidence to support the jury's finding of pretext, the court held.

The employer's shifting explanations for the Plaintiff's discharge created a triable issue of fact with regard to pretext, the Ninth Circuit held, reversing summary judgment on a retaliation claim. In granting summary judgment, the United States District Court of Montana had discounted inconsistencies in the employer's explanation by reasoning that they all came under the general Court's explanation--- "insubordinate behavior"--- that the employer had relied upon.(District Court's opinion was published at 911 F. Supp. 1299.)Disagreeing, the Ninth Circuit emphasized substantial differences between the explanations advanced by the employer at various times, even Though it might have been possible to class them all under the heading of subordination." It may be that Norwest's shifting explanations are acceptable, "the

Ninth Circuit wrote."**However, such weighing of the evidence is for a jury, not a judge.**" The Court emphasized that," the Plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext. **Payne v. Norwest Corp.** (9th Cir. 1997).

Supreme Court Judge Thomas stated in Robinson v. Shell Oil," nowhere in Title VII is either phrase used—even where the specific context otherwise makes clear an intent to cover current or former employees."

With this in mind, the Plaintiff could not include retaliation in his charge of discrimination because he was unaware that this adverse action had taken place. He was not made aware of this issue until discovery and the Defendant's Deposition. If we follow Judge Thomas' opinion then Plaintiff should be allowed to proceed with a charge of retaliation.

Question 6

The Fourth Circuit states," this evidence does indicate that Plaintiff initially performed satisfactorily, at least based upon Horton's evaluation. Nonetheless, Healey (Plaintiff's other supervisor) evaluated Plaintiff's performance and determined that Plaintiff was not performing satisfactorily." Summary Judgment page 11 2nd paragraph.

Consider this evidence, we agree according to the Fourth Circuit that Plaintiff was performing well in his duties in March 1997. If this statement is weighted then the written warning dated on February 19, was pretext for discrimination because:

1. John Horton states in his Affidavit," that he was the General Manager of the account and was responsible for the day to day operations." Affidavit #2
2. John Horton also states, " that he was responsible for evaluating Mr. Beasley's performance and disciplining him if necessary." Affidavit #3
3. John Horton continues to say, "Mr. Beasley received a merit increase and on **March 19th, 1997, I gave him a satisfactory performance evaluation. As of March 19, 1997, Mr. Beasley met my performance expectations."** Affidavit #7
4. John Horton says," during my entire time of my employment with Sodexho, David Healey never told me he objected to my satisfactory evaluation of Mr. Beasley's performance." Affidavit #13
5. With regard to the Defendant's observation of Plaintiff John Horton says," David Healey spent little time on site at the account and did not even have a full time office there. He spent little time observing employee performance." Affidavit #12
6. Most important, John Horton indicates," it is not true that Mr. Beasley's

performance was consistently below standards or that there were regular or routine inconsistencies in his performance when he was cafeteria manager.
Most inconsistencies were beyond his control and others were resolved satisfactorily." Affidavit #17

7. To substantiate the point of the last statement John Horton says," The customer surveys and my day to day observations of Mr. Beasley's performance demonstrated to me that his performance was at least satisfactory." Affidavit #16

This evidence disputes the written warning given in February, 1997, by the Defendant, it is clear that Plaintiff was performing his job satisfactorily.
However, during this time Defendant had learned about Plaintiff's protected activity. His decision to issue Plaintiff a written warning during this time in the minds of any reasonable jury would conclude pretext for Discrimination and Retaliation.
Finally, when Defendant Healey was asked in his deposition," if the performance evaluation that Mr. Beasley received was meets expectation, and he's given that by his manager who reports to you, and he believes by having received that his performance was average, isn't him receiving something else from you an inconsistency to him relative to his performance?
Answer: I can see how that would cause some confusion. Healey Depo. Page 100, 5-18.

Question 7
In the deposition of David Healey the questioning went as follows, "
Q On 3-19-97, did Mr. Horton report to you?
A Yes
Q He was one of your managers?
A Yes," Healey Depo. Page 247, 2-5
In addition to the deposition of John Horton, this is a serious mistake on the part of the Fourth Circuit involving the Discrimination and Retaliation.
Both the Defendant and John Horton makes very clear who is the immediate supervisor and who is the superior.
When the Fourth Circuit says, "It appears that Horton and Healey were equal in rank, and they reported to Chris Jackson, Sodexho's Vice President" is a grave error in understanding the facts. This is a vital point in this case because David Healey disciplined the Plaintiff for inconsistencies but failed to discipline the non-minority for the same inconsistencies. Yet, he indicated he did not discipline the non-minority because he did not report directly to him. As the evidence clearly shows that on March 19, 1997 Plaintiff did not directly report to him either.

Question 8
In Harris v. Forklift Systems, Inc., the Supreme Court clarified the nature of a "hostile work environment" under Title VII of the Civil Rights Act.
The Court resolved a conflict among the different Circuits by ruling that an employee has an actionable claim for hostile environment harassment even when the conduct complained of has not resulted in serious psychological injury. Reaffirming its earlier decision in Meritor Savings Bank v. Vinson, the Court stated that a workplace permeated with discriminatory conduct sufficient "to alter the conditions of the victim's employment" violates Title VII, regardless of whether such conduct causes tangible psychological injury.

1. John Horton states, "between 1996 and 1997, when I left, many employees, Mainly cafeteria workers, complained about race discrimination at the University of Maryland Medical Center, Food and Nutrition Services Dept. that was contract managed by Sodexho. Affidavit #9
2. "I recall hearing use of and complaints about, derogatory remarks about black employees and/or black people." Affidavit # 10
3. "The complaints of race discrimination, which were very common and known to upper management, related to working conditions and disparity in discipline."
4. "Race relations was an issue throughout my tenure at Sodexho's UMMS account. I brought the issue to the attention of my boss Chris Jackson and to Human Resources, but nothing was done." Affidavit # 23
5. Joann Merritt states in her deposition, "I complained about how black employees were being treated to Neile Grady Martin in Human Resources before I was terminated, but nothing was done. Affidavit #5

This is very strong and compelling evidence that Sodexho knew about the racism and they condoned it because of the lack of concern and follow-up. Many employees, not just the Plaintiff voiced a concern of discrimination and unequal treatment during 1996 and 1997.

REASONS FOR GRANTING THE PETITION

Of the 5 to 6 million African Americans residing within the jurisdiction of the Fourth Circuit(largest black population of all Circuits) it is vital that this Petition be granted because of the conservatism and the strict application of the law that will discourage all future protected activities.

There are many reasons that this Petition should be granted, that among these are:

1. African Americans all across the country are put in comparable or the same positions as non-minority co-workers, with the same set of circumstances, yet they are governed by the strictest of policies and standards; while the white co-worker is governed by a more lenient policy or standard. This issue definitely needs to be addressed again as a 21st century standard for all Circuits.. McDonald v. Sante Fe Transp Co.(1976)
2. It must be emphasized in all Circuits that the State Law Governing Employers need to be adhered to regarding specific scenarios within individual cases. The Supreme Court **must set a standard of how the State Laws are to be applied, not at the discretion of a Circuit Court Judge but a consistent application of the Law based on submitted evidence.** For example, it is a talked about issue among African Americans that Circuit Court Judges only will allow a certain percentage of cases to pass summary judgment. This type of thinking discourages protected activity. Therefore, the Court must set a standard of application based on uniqueness of each individual case and not the traditional standard as was evident in this case. In plain terms have the Law fit the case and not the case fit the Law. In this case, the case was to fit the law and not the other way around. According to

Maryland Law Governing employers, when the Plaintiff admits to substandard performance his prima facie case changes.This did not happen in this case. This needs to be brought to the attention of the Fourth Circuit because the employer could always articulate the reasons for termination and they could always be classified as insubordinate behavior.

3. The Supreme Court is going to have to clarify "reasonable doubt" in all of the Circuits because according to the Fifth Circuit in Polanco v. City of Austin sufficient evidence existed for the jury to conclude that disparity in discipline had emanated from a discriminatory motive. Also the Ninth Circuit said, " that the District Court had discounted inconsistencies in the employer's explanations." Also the Ninth Circuit stated, "substantial differences in testimony by the employer is for a jury to decide not a Judge." It is imperative for the Supreme Court to communicate and establish a precedence to the Fourth Circuit to encourage protected activity.
4. The issue of "adverse employment action" needs to be defined. The First, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits have all rejected the "ultimate employment decision" standard followed by the Fifth and Eighth Circuits. Likewise, they have found conduct sufficiently adverse to support retaliation claims when it would appear to fall short of the "material" or "tangible" effect followed by the Second, Third, Fourth and Sixth Circuits. For example, in Johnson v. Dimario , 1998 U.S. Dist. LEXIS 12678, *4 (D.D.C.1998) a written reprimand, which can serve as foundation for future corrective action, is sufficient adverse action to support Title VII retaliation claim.

The meaning of the term "employee" has been defined in Robinson v. Shell Oil, to include current and former employees. Therefore, in this case it is clearly obvious that the

Plaintiff did not know about the surveillance being conducted by his co-workers and his Immediate supervisor's boss. (defendant)

This is a critical issue because many minorities involved in a protected activity could be monitored daily more closely than non-minorities causing an adverse employment action and they are completely unaware. When they become aware, it is essential for them to be able to raise a claim of retaliation during post employment. (Although the retaliation took place before the administration period, it was not known until post employment and after the filing deadline had passed)

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Marcus A. Beasley

Pro Se Petitioner